Docket Unit
California Energy Commission
Docket No. 03-QCTA-1
1516 Ninth Street, MS-4
Sacramento, CA 95814

Via E-mail: DOCKET@energy.state.ca.us

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RE: Regulations to Approve Technical Assistance Providers and Certifiers for the California Climate Action Registry

ICF Consulting offers the following comments regarding the above referenced proposed regulations.

Objective

Through the California Climate Action Registry (CCAR), the State of California provides a mechanism by which entities operating in California can report officially their greenhouse gas (GHG) emissions. The State has committed itself to defending the reported emissions data in the event of future GHG emissions policies. The State, therefore, has the objective of ensuring that the information reported to the CCAR is verified as accurate. It is our understanding that the objective of these proposed regulations is to ensure that the technical service providers and the certifiers of emissions reports to the CCAR are qualified to perform their activities within this overall context. In particular, the validity of the emissions reports rests on the ability of the certifiers to review and certify the emissions reports. To fulfill this role, the certifiers must be both technically proficient and free from conflicts of interest.

Overall Comments

Overall, ICF Consulting finds the CEC's proposed regulations to be consistent with our understanding of the objectives of the rules. The CEC is striking a balance between imposing requirements on technical service providers and certifiers, and recognizing that the field is new and in the process of developing. We support the review of staff qualifications as an indicator of organizational capability to provide certification services. We also support the case-by-case conflict of interest determination method in the proposed rules. Although considered burdensome by some, we believe that the importance of preventing conflicts of interest warrants the effort.

While we support the overall approach to the rules, we offer several comments that we believe will reduce the burden on service providers and CCAR participants. Additionally, we believe that several issues require clarification. We offer these comments organized by section.

Section Comments

Section 2810. (a)(2) requests a list of "…any judicial proceedings filed against the firm within the previous five years." This request is too broad, and its purpose is unclear. We ask that the CEC narrow the request to ask for information that is relevant to the qualifications of technical service providers. For example, the request could be narrowed to include proceedings involving similar technical services in which a court has found against the firm.

(a)(3) asks for samples of work products, in two areas, including "auditing environmental responsibility" and "developing greenhouse gas related software." Neither of these two areas is defined, and may be open to considerable interpretation. We ask that the areas be defined. We expect that the definitions allow for experience to include developing GHG emissions protocols and emissions inventories, as well

as collection and analysis of data supporting the development of emissions inventories. We propose that experience with GHG emissions be required.

Section 2811. This section allows technical service providers to be accepted without having any GHG emissions experience. We propose that "other air emissions-related experience" is not sufficient to be accepted as a technical assistance provider. We ask that GHG emissions experience be required.

Section 2820. (a)(1) requests "…financial statements for the previous fiscal year." There are several points to be made here. First, it is unclear what role the financial information will play in the determination of the acceptability of the applicant. While the CEC may desire that certifiers be financially stable, financial reports are not particularly good predictors of financial viability. Recent events remind us that even firms with strong balance sheets can fail spectacularly in a short period of time. Second, a firm with a "weak" financial statement may be acceptable as a certifier. For example, an organization undergoing chapter 11 reorganization may pose no added risk to the CCAR participant or the state relative to another certifier with a "good" financial statement. Finally, in requesting "financial statements" the CEC makes no mention of a requirement that the statements be audited (i.e., audited financial statements). If the CEC has a valid use for the information in the statements, then the statements requested should be audited.

Rather than request financial statements (audited or otherwise), we recommend that the applicant certify that it has the financial resources to perform certification under contract terms into which it expects to enter. While we acknowledge that this self-certification may appear to be less compelling than financial statements, we believe that the financial statements themselves are of limited value in making this determination.

(a)(2) requests a "…copy of the insurance policy…" showing certain coverages. We propose that a copy of the insurance policy is not required, but rather proof of insurance is adequate. The industry-recognized standard proof of insurance should be adequate for this purpose. As a second point, however, we question the need to provide proof of insurance in the amount requested. Presumably, this requirement is included to protect the CCAR participant in the event that the certifier is negligent in the performance of its work. We do not see how the insurance would protect directly the state or the CCAR, as neither would be a party to the contract between the certifier and the participant, and consequently neither would have standing in a complaint regarding services performed under such a contract.

The protection afforded to the participant by the insurance will depend on the terms of the contract between the certifier and the participant. Not withstanding the existence of such insurance, the contract may limit the certifier's liability. For services of this type, it is typical for liability to be limited to some multiple of the contractor's payment, such as one or two times the total payment. Given that the magnitude of the cost of certification is well below $1 million, and in nearly all cases may be below $50,000, the requested insurance coverage may be of limited importance.

While we recognize that the contract between the certifier and the participant is the primary instrument that will protect the mutual interests of the certifier and participant, we do not recommend that the CEC prescribe the terms of the contracts. Rather, we believe that given competition among certifiers, the parties should be free to enter into agreements that they believe best suit their mutual interests.

Finally, it should also be recognized that proof of insurance at the time of application does not guarantee that the insurance remains in place while the certifier is providing services. Consequently, as currently configured, the requirement cannot guarantee that the participant is protected by the certifier's insurance.

Based on these considerations, we propose that the insurance requirement be dropped. If the CEC retains the requirement, we propose that proof of insurance be acceptable as an alternative to a copy of the insurance policy.

(a)(4) requests a list of any "…judicial proceedings…that might adversely affect the ability of the applicant to perform certification services…" We appreciate that this request is more narrow than the request for technical service providers (discussed above) in that it is limited to only those proceedings that would have an adverse impact. We believe that this request should be narrowed further by defining the manner in which a judicial finding adversely affects the ability of the firm to provide certification services. Additionally, we believe that referencing all filings is too broad, and that judicial findings (by courts of competent jurisdiction) would be a more appropriate requirement.

(a)(5) refers to expertise in "key topics." Although the key topics were listed in the previous RFA, it is appropriate to define them in these regulations.

(a)(7) requires that the applicant provide a technical approach. We interpret this requirement to be a demonstration that the applicant has mastered the CCAR certification requirements, and understands the process. We agree that such a demonstration is important, but question whether drafting a technical approach section in the application is the best method for achieving this goal. We recommend that the CEC discuss with the CCAR its approach to requiring attendance at certifier training in order to be designated a "lead certifier" – and considering the requirement that in order to initiate certification activities that the certifier organization have at least one lead certifier who would be required to sign the certification opinion. Such a demonstration of the mastery of the subject matter by a specific lead certifier would, in our opinion, be more meaningful than a technical approach section in an application.

(a)(10) requests a description of how staff knowledge is updated. Without criteria for deciding whether such actions are adequate, this request is not meaningful. At some time in the future, a professional organization of certifiers may become recognized that may have continuing education requirements. Until such a program is developed, a request for a general description of how staff knowledge is updated does not contribute to the determination of qualifications for certifier organizations. We recommend that this requirement be dropped.

Section 2821. This section defines minimum quantitative requirements. The selection of the levels of the requirements is certainly subjective. These levels have presumably been selected to help ensure that the certifiers are stable entities capable of providing professional services and standing behind their work. Our observations regarding these requirements include the following. The requirement for $4 million in revenue may be large relative to the size of the certification engagements typically encountered. Requiring 15 staff seems high – perhaps 10 staff would be sufficient. It is not clear why the knowledge of "information management systems" (which are not defined) qualifies a designated staff person as acceptable. We would like the requirements to focus more specifically on knowledge of GHG emissions.

Paragraph (f) states that "…(s)taff experience shall only be considered as firm experience if the applicable staff person(s) was employed by the applicant when performing relevant work." We believe that this requirement is too stringent. An applicant can assemble a set of experts that previously worked for other firms. The experience of these experts, we believe, should be appropriately considered as part of the capability of the applicant. The fact that they had gained this experience elsewhere does not diminish their experience or expertise.

Section 2822. It is unclear why industry-specific requirements should be reduced relative to general certification requirements. We recommend that the requirements be the same.

Section 2831. Appendix A and Appendix B, referred to in (c) did not appear in the materials.

Section 2841. It is our reading of this section that it requires case-specific determinations of conflict of interest in the manner currently in use by the CEC for the CCAR certifier activities. We support this approach as being appropriate for ensuring that certifiers are not influenced by other business relationships with the CCAR participant. In particular we believe:

- The conflict of interest assessment should encompass the entire participant organization and the entire certifier organization, including parent companies and related subsidiaries.
- Geography is not, in and of itself, a factor that causes or eliminates conflict of interest. Rather, it is one factor that needs to be considered.
- The nature and dollar value of non-certification business conducted between the certifier and the participant is relevant to the assessment of potential conflict of interest.

We understand that the current and proposed approach is considered by some to be burdensome, and we support efforts to streamline the process and reduce the burden. However, we do not believe that the fundamental requirements should be sacrificed. We do ask that the language in section (b)(3) be reviewed, as it is unclear to us how this is to be interpreted. For example, it appears that a certifier cannot provide services if it provided one year of certification, followed by a one year lapse.

Section 2850. (c) requests an updated list of staff prior to providing certification services. The timing of this submission is not clear here. If this requirement is meant to be part of the process by which the Commission approves the certifier for a specific engagement (i.e., as part of the conflict of interest determination), then the requirement would be more appropriately described as such. Alternatively, it may be adequate for certifiers to re-confirm their staff lists annually, without respect to the timing of the start of certification engagements. This requirement needs to be clarified.

Section 2852. This section lists reasons why the Commission may rescind approval of a service provider. We understand that these reasons apply to the service provider entity (i.e., firm) rather than the individuals who may be listed by the entity. We question whether "moral turpitude" can be appropriately listed in this respect.

Thank you very much for the opportunity to provide comments on the proposed regulations. We support the CCAR and the Commission's role in ensuring the accuracy of the emissions reporting process. I am happy to discuss these comments with you at your convenience.

Sincerely,

Michael J. Gibbs, Senior Vice President
ICF Consulting